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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 803

AUSTIN F. AKIN,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA.
SHREVEPORT DIVISION

Civil Action No. 1488

AUSTIN F. AKIN,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants-Appellees

ANSWER TO MOTION TO AFFIRM

The plaintiff-appellant respectfully shows that Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, does not apply to this case. Such rule applies only to cases set out in paragraph 1 thereof, "upon the presentation of a petition for the allowance of an appeal."

On the merits of the motion, the appellant says that a substantial question is raised; that the record has not been printed, and he cannot therefore file a brief as required by Rule 7, and make pertinent reference thereto as required by the rules for briefing, and must be content with pointing out the substantial questions involved.

The motion correctly states the rule from *Alton R. Co.* v. *United States*, 315 U. S. 15, that "substantial parity between future operations and prior bona fide operations is

contemplated." It is the contention of the appellant, which it desires to brief and argue before this Court, that it is entitled to that substantial parity, and that the parity referred to means the same over-all character of operation. Appellant contends that the character of its operation on the effective date of the Act, as being a contract or common carrier, must be determined by the law then in force; that whatever character its over-all operation had under the law then existing, Congress intended that he should have the right to continue. If he was a common carrier under the law then in force on the effective date, he was entitled under substantial parity to continue as a common carrier. All evidence, therefore, that throws any light on the over-all character of his operation under the law then in force is admissible and must be considered by the Commission and the court. This the Commission and court failed to do.

What was the character of his over-all operation under the common law, which was the only law in force and applicable to him on the crucial date? One simple test will fix it. *If he was holding himself out to the general public as engaged in the business of transporting property for hire, and was actually engaged in hauling some of it generally for the public, he was a common carrier under the law then in force, and it could make no difference that he hauled some merchandise for some shippers under a special contract of employment.*

It was held in *State of Washington* v. *Kuykendall*, 275 U. S. 207, 72 L. Ed. 241, that "a common carrier may be defined very generally as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally." It does not change his status as a common carrier to make written contracts with his patrons for tariffs different from the

common tariff. *Day Coop. Sales Association* v. *Public Service Commission,* 177 Atl. 170, 98 A. L. R. 218. See annotations, 18 A. L. R. 1316.

In *Bank of Kentucky* v. *Adams Express Company,* 193 U. S. 174, the express company contended that it was a contract carrier and its liability was therefore restricted under its contract for restricted liability. The Supreme Court of the United States rejected that theory with this statement: "What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers." It was held by the Supreme Court in *Liverpool & Great Western Steam Company* v. *Phenix Insurance Company,* 129 U. S. 397, 32 L. Ed. 788, that a common carrier is such by virtue of his occupation, and he cannot change his character as a common carrier because he makes a special contract with some of his shippers. The court said:

> "A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, * * * it is a common carrier; and a special contract about its responsibility does not divest it of that character."

The Supreme Court held, in *United States* v. *Carolina Freight Carrier Corporation,* 315 U. S. 475, that it was the holding out as a common carrier to carry all kinds of commodities and his carrying of some of them, that made the carrier a common carrier.

The undisputed evidence and findings of the Commission show that the appellant held himself out to transport

indifferently for the public at large, and was actually engaged in transporting such commodities for the public generally, and in addition hauled packing-house products by special contract with Swift & Company and its subsidiaries. The foregoing decisions demonstrate that appellant was a common carrier of everything it hauled, including the packing-house products which it was hauling at the same time under a special tariff different from its common tariff. The foregoing decisions and others cited in them all show that appellant's status and liability both as to Swift & Company and the public generally for whom he hauled, was a common carrier. This being true, the Commission and trial court were in error in excluding evidence of the amount of freight he hauled under special tariff contracts for the purpose of determining the character of his over-all operation on the effective date of the Act. If substantial parity is to be maintained and his position in the national transportation scheme is to be maintained just as it was when the law became effective, all evidence which would show exactly what the character of that operation was is admissible and absolutely necessary. When the Commission and the court refused to consider all of such evidence, they therefore applied a rule and standard not fixed by Congress for determining such character, and their rulings were unreasonable and arbitrary.

The fact that the Commission might in the public interest, after the effective date of the Act, order the appellant to discontinue hauling commodities under special tariff contracts and limit him to hauling for the public under common tariffs, does not affect the question under consideration.

As a matter of fact, the Motor Carrier Act, Sec. 203, defines a common carrier just as it was defined under the common law, and if we apply the test under the common law or under the Act, the appellant was a common carrier on the

effective date. The Motor Carrier Act, like the common law, also recognizes that one who is a common carrier and at the same time and by the same vehicle hauls some shipments by special tariff contract, is nevertheless a common carrier in his over-all operation. Sec. 203 defines a contract carrier as "any person not included under paragraph 14 of this Section" but for the purpose of the Act went on to provide "or which under special and individual contracts or agreements, transports property for compensation."

The appellant does not contend that he is entitled as a matter of law to continue to haul commodities under special tariff contracts as he did for Swift & Company unless the Commission authorizes him to do so. He does contend that up to the effective date of the Act, all the evidence, both as to what he hauled for Swift & Company and what he hauled for the public generally, can and must be considered in determining the character and extent of his operation before and at the effective date.

He likewise contends that all evidence of such over-all operation up to the date of the hearing was admissible and necessary for the purpose of determining whether he continued the same type of over-all operation after the effective date. How else could it be ascertained whether or not he had continued in substantial parity his previous operation? The Commission arbitrarily refused to consider, and the trial court sustained it, any evidence of any shipments made under special tariff contracts, either before or after the effective date. Notwithstanding, they were all transported by the same vehicle, at the same time, with the same driver, and over the same line. If he was a common carrier before the crucial date, but also hauling some commodities under special tariff contract, he should have been allowed to offer, and the Commission should have considered, all evidence showing the extent of such

operation. If he continued to haul as a common carrier, and in addition carried commodities under special tariff contracts after the crucial date up to the date of the hearing, he should have been allowed to offer evidence, which the Commission should have considered, of the extent and nature of those operations. From all such evidence thus introduced, the Commission would necessarily have been required to find that he was a common carrier before and after the crucial date, and the fact that he may have hauled more or less commodities under special tariff contract than he hauled under common tariff, would not affect his good faith. He had a right to continue operation just as he had been under the express terms of the statute, until the Commission could dispose of his application.

The act of the Commission in carving out and excluding from evidence the commodities hauled by special tariff contract at the same time that he was hauling under common tariff, both before and after the crucial date, is arbitrary and unreasonable and contrary to the standards and requirements fixed by the Congress. This error in interpreting and applying the Act makes it immaterial whether there was any substantial evidence to support the Commission's findings.

We believe these authorities thoroughly demonstrate that a very substantial question is raised.

The assignments of error and points relied upon point out the failure and refusal of the Interstate Commerce Commission and the trial court to consider the great volume of oral testimony, and that such failure and refusal was itself grounds to reverse and set aside the order.

In order to deny the application, it was necessary to find that the appellant wholly abandoned his operations as a common carrier after the crucial date, and there was no evidence to show such abandonment.

Wherefore, premises considered, the appellant prays that the motion to affirm be denied and that the matter be set down for briefs and oral argument.

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